IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAWRENCE E. FELDMAN, d/b/a/ LAWRENCE E. FELDMAN AND Associates,	:	
Plaintiff,	:	
v.	:	CIVIL ACTION No. 06-cv-2540
GOOGLE, INC.,	:	
Defendant.	:	

PLAINTIFF'S REPSONSE TO
DEFENDANTS' SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

Plaintiff Lawrence Feldman ("Feldman") submits this supplemental memorandum in response to the supplemental memorandum of Defendant Google, Inc., (hereafter "Google") in support of their motion to dismiss the amended complaint.

While Google ostensibly moves to dismiss the amended complaint dated August 9, 2006, it utilizes arguments which address the original complaint dated June 5, 2006, which is no longer operative. The original complaint contains a breach of written contract claim while the amended complaint alleges a breach of implied contract, an equitable theory of relief rather than a legal claim. The Original Complaint was amended in accordance with Fed.R.Civ.P. 15(a).[1]

[1] A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served. Fed.R.Civ.P. 15(a).

Dockets.Justia.com

Defendant Google has ignored this amendment in successive pleadings despite the established precedent that "an amended pleading supercedes all prior pleadings and the prior pleadings have no further role in the case." *Snyder v. Pascack,* 303 F.3d 271, 276 (3d Cir.2002). Furthermore, a motion directed at a prior pleading should be considered directed at the new pleading only where the defects in the original pleading remain in the new pleading. *Jordan v. City of Philadelphia,* 66 F.Supp.2d 638, 641, n 1 (E.D.Pa.1999). In the instant case the Plaintiff has retracted a legal theory of relief, breach of written contract, for an equitable one, breach of implied contract, due to the uncertainty in the formation of the agreement. Google knocks down a straw man by continuing to reassert the original complaint as the basis of all its supplemental pleadings to dismiss. These pleadings should be dismissed as moot as they are not directed at the current, valid complaint against them.

Moreover relief is due quite apart from whether or not a contract existed on the AdWords website at the time of Plaintiff's purchase. Plaintiff has consistently argued that relief is appropriate under an equitable theory independent of the alleged contract upon which Google relies, which is one of adhesion and unenforceable based on its "take it or leave it" terms. Google fails to address this argument in its Supplemental Memorandum to Dismiss the Amended Complaint and instead reiterates the same arguments in opposition to a breach of contract claim that is no longer a part of these proceedings. As such the Motion to Dismiss the Amended Complaint should be denied as moot.

Finally, Plaintiff asserts that the affidavit of Google's employee Annie Hsu is an admission that the AdWords agreement is a boilerplate form agreement presented in nonnegotiable terms, which states "[u]nless he agrees to the AdWords contract, the advertiser can never activate his account, which means that he can never place any ads or incur any charges." *See Decl. of Google, Inc. Representative Annie Hsu.* [2]

For the above mentioned reasons Plaintiff moves for this Court to Deny the Motion to Dismiss the Amended Complaint as Moot. A proposed order follows.

Dated: 12/22/06

BY:
Lawrence E. Feldman
William Angle
432 Tulpehocken Avenue
Elkins Park, PA 19027
(215) 885-3302
(215) 885-3303 (fax)

Attorneys for Plaintiff

[2] Plaintiff has already moved for partial summary judgment base upon Google's admissions. See Plaintiff's Motion for Partial Summary Judgment attached hereto as Exhibit A.

IN THE UNITED STATES DISTRICT COURT
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Plaintiff,	:	
v.	:	CIVIL ACTION No. 06-cv-2540
GOOGLE, INC.,	:	
Defendant.	:	

ORDER

AND NOW this day of , 2006, upon consideration of Defendant's Motion to Dismiss Amended Complaint, and any response thereto, it is hereby ORDERED and DECREED that the motion is DENIED.

BY THE COURT:

HONORABLE JAMES T. GILES
Judge, United States District Court

CERTIFICATE OF SERVICE

The undersigned, counsel for Lawrence E. Feldman hereby certifies that a true and correct copy of the foregoing Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment was sent via first class mail postage pre-paid this day to the following individual(s):

Jeffrey M. Lindy
1800 J.F.K Boulevard, Suite 1500
Philadelphia, Pennsylvania 1903

Attorney for Defendant Google, Inc.

Date 12/22/2006

BY: ______________________
William E. Angle, Esquire

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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LAWRENCE E. FELDMAN d/b/a
LAWRENCE E. FELDMAN
& ASSOCIATES

v.

GOOGLE, INC.

No. 06-cv-2540

FILED DEC 06 2006

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Lawrence E. Feldman hereby submits the following Motion for Summary Judgment and relies upon the within Memorandum of Law in support thereof.

Dated: 12-4-6

BY: ______________________

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAWRENCE E. FELDMAN d/b/a LAWRENCE E. FELDMAN & ASSOCIATES	:	No. 06-cv-2540
v.	:	
GOOGLE, INC.	:	

MEMORANDUM OF LAW IN SUPPORT OF HIS
MOTION FOR SUMMARY JUDGMENT

Plaintiff Lawrence E. Feldman hereby submits the following Memorandum of Law in Support of Motion for Summary Judgment:

I. Background

Plaintiff Lawrence E. Feldman filed his Amended Complaint (hereinafter "Complaint") on or about June 5, 2006. [1] Plaintiff's Complaint alleges four counts: Breach of Implied Contract (Count I); Breach of the Implied Covenant of Good Faith and Fair Dealing (Count II); Fraudulent Concealment (Count III); Negligence (Count IV); and, Unjust Enrichment (Count V). Google moved to dismiss the Complaint on the basis of a forum selection clause contained in a written contract that it asserts against Plaintiff, which stated that any litigation must occur in California. Google seeks dismissal or in the alternative, transfer of this matter to Santa Clara, California pursuant to the forum selection clause.

On November 1, 2006, after hearing oral argument on Google's motion to dismiss, this

[1] This matter was originally commenced in Common Pleas Court of Philadelphia County via Writ of Summons on March 9, 2006. Thereafter, Plaintiff filed a Complaint. Defendant Google removed this matter to this federal court based upon 28 U.S.C. § 1331 (diversity).

honorable Court converted the motion to dismiss to one for summary judgment under Fed. Rule Civ. Proc. 56. The Court ordered the parties to take limited discovery on the issue of what the program offered to any user of Google's advertising program, Adwords, in making choices; and in accepting the terms of any agreement. *See, Trans. of Proceedings Before Hon. James T,. Giles, Nov. 1, 2006,* pp. 22-23. This Court further explained that after reading many cases on the subject of "click wrap" it is important to develop a record for an Appellate Court as well as for the parties as to what transpires when an agreement is entered into between Google and a prospective advertiser. *Id.* Google submitted the Declaration of Annie Hsu, a Google Adwords associate employed with Google since June 2004. Plaintiff Feldman relies upon the Hsu Declaration in support of its Motion for Summary Judgment.

II. ARGUMENT

Plaintiff Feldman asserts no claim for breach of an express written contract, but rather one implied in law. Plaintiff's position is that the contract Google seeks to assert against it to transfer this matter is unconscionable because its terms are not accepted after an arms-length negotiation with any Google representative. Rather, Google's offers its contract on a "take ir or leave it basis." Pl. Brief in Opposition to Motion to Dismiss, p.8-9. Thus, the forum selection clause is void, and transfer of this matter to the California courts must be denied.

In support of its position, Plaintiff correctly pointed out at oral argument, that no advertiser seeking to purchase "Adwords" from Google can reject any of the contract's terms appearing on Google's website, and still continue to purchase advertising services from Google's Adwords program. This argument is supported by the Hsu Declaration submitted by Google.

Defendant Google, on the other hand, argues that the writing is not a contract of adhesion, because potential advertisers with Google have the opportunity to negotiate different terms than those that appear on Google's internet website, even the forum selection clause Google asserts herein. *See, e.g.*, Def. Brief in Support of Motion to Dismiss, p. 9. However, this argument is contradicted by Google's own employee, Annie Hsu. While Ms. Hsu states in her declaration that Google's contract is able to be viewed in its entirety by potential advertisers, she also states that no potential advertiser such as Plaintiff Feldman can set up an account and purchase Adwords if they do not assent to all of the contract's terms. *See,* Def. Google's Supplemental Memorandum in Support of Motion to Dismiss Amended Complaint, and Declaration of Annie Hsu, ¶¶5, 6. [2] Ms. Hsu's description of the contract as well as the process by which a potential advertiser creates an Adwords account more than meets the definition of an adhesion contract. Under Pennsylvania law, an adhesion contract is a form or standardized contract prepared by one party, to be signed by the other party in a weaker position who has little choice regarding its terms and without the opportunity to negotiate or bargain its terms. *McNulty v. H & R Block, Inc.* 843 A.2d 1267, 1273(Pa. Super. 2004); There must be both procedural and substantive unconscionability in order to void an arbitration provision or a contract in general. *Ostroff v. Alterra Healthcare Corp.*, 433 F. Supp. 2d 538, 542 (E.D. Pa. 2006). "Procedural unconscionability" describes the process by which the parties entered into the contract. *Id.* It has been defined by the Pennsylvania Supreme Court to mean the "absence of meaningful choice on the part of one of the parties." *Id.* quoting *Witner v. Exxon Corp.*, 495 Pa. 540, 434, A.2d 122, 1228 (1981). A contract of adhesion is one prepared by a party with excessive bargaining power and presented to the other party on a "take it or leave it" basis. *Parilla v. IAP Worldwide Services, VI, Inc.*, 368 F. 3d 269, 276 (3rd Cir. 2004).

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[2]According to Ms. Hsu's declaration, only very large advertisers get the opportunity to interact with Google representatives, and that these are exceptional cases, and not the rule. Even so, it is not clear from Ms. Hsu's declaration or anything submitted by Google that even large advertisers get to negotiate any of the contract's terms.

Applying these standards to the case at bar, it is clear that Google's Adwords contract is procedurally unconscionable. No one other than perhaps a large advertiser, is ever given the opportunity to discuss let alone, negotiate any of the contract's provisions with a Google employee. And, according to Google, it is a rare case when an advertiser interacts with a Google representative. Hsu Decl. ¶¶5,6. Google offers its terms on a take it or leave it basis. One must assent to the terms of the contract in order to proceed to create an Adwords account. Google relies heavily upon the notion that a prospective advertiser has the opportunity to review every provision of the contract. However, this is not the end of the inquiry. Without a meaningful choice, the ability to view the terms of a contract is meaningless if those terms must be assented to in order to proceed. Google misses the point. The procedure adopted by Google would have the same effect if it displayed a blank page instead of a seven paragraph online form agreement.

Assertion of the contract further offends the notion of procedural unconscionability by violating Rule 23(e) of the Fed.R.Civ.P. which requires that class members be given information "needed to decide, intelligently, whether to stay in or opt out." *Amchem Prods. v. Windsor*, 521 U.S. 591, 628, (1997); see also *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985) (stating that class members must be provided with meaningful notice and an opportunity to exclude themselves from the class and setting forth "procedural due process protection[s]" necessary for a class action judgment to have binding force on absent class members), cited in *In Re Diet Drugs*, 282 F.3d 220, 230-231 (3d Cir. 2002).

The fact that all individual opt out claims against a class action defendant must be litigated in a specific forum in California is required information "needed to decide, intelligently, whether to stay in or opt out." *Id. Lane's Gifts and Collectibles, LLC. v. Yahoo! Inc.*, Case No. CV-2005-52-1 (Ark. Cir. Ct. complaint filed Feb. 17, 2005), failed to provide this information to its class members in the settlement notice.

Secondly, this Court must find that Google's forum selection provision is substantively unconscionable. "Substantive unconscionability" is found where the terms of an arbitration provision or contract "unreasonably favor" the party with the greater bargaining power. *Ostroff* at 543. Here, Google's forum selection clause unreasonably favors Google in requiring that disputes over the amount that Plaintiff Feldman was charged for fraudulent clicks must be adjudicated in Santa Clara County, California. This provision works an undue burden on Plaintiff Feldman. Mr. Feldman is not well and his physician's restrict travel at this time. *See* Declaration of Lawrence E. Feldman, Esquire (a true and correct copy of which is attached hereto as Exhibit A.) In addition to this, the cost of hiring a lawyer in California for what is essentially a billing dispute would be prohibitively expensive in light of any potential recovery.

Based upon the evidence submitted by Google in its Memorandum in Support of Motion to Dismiss, this Court cannot say with certainty that the contract Google asserts against Plaintiff in an effort to transfer this matter to California, was not one of adhesion.

The contract boasts other clauses that are substantively unconscionable as well. The contract limits the aggregate liability of any possible claim to amounts paid or payable to Google by the customer and within sixty days of the charges. This Court has specifically held a broad restriction on possible remedies and a thirty-day limitations period on the notice of a claim as "clearly unreasonable and unduly favorable." *Anthony vs. Alexander International, L.P.* 341 F.3d 256, 266 (3rd Circ. 2003). The sixty day notice allowance in Google's contract is little better considering that other Circuits have struck down more generous one-year limitations periods on the grounds that they deprived the plaintiff of the benefit of the continuing violation doctrine. *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 894 (9th Cir.2002), cert. denied, 535 U.S. 1112, 122 S.Ct. 2329, 153 L.Ed.2d 160 (2002). Google's practice of not keeping accurate click history for more than a few months further compounds the unconscionability of the contract.

The contract disclaims all warranties "express or implied, including without limitation for noninfringement, merchantability and fitness for any purpose." By the very wording of the contract charges are made at Google's complete discretion and refunds are only issued by way of advertising credits. According to the wording of the contract Google would be allowed to charge any sum ("solely based on Google's click measurement") and, if fraudulent, issue a refund in credits, but at their sole discretion and only if a claim is brought within sixty days. These one-side provisions which purvey the contract rendering it substantively unconscionable.

III. CONCLUSION

For the above mentioned reasons Plaintiff Feldman respectfully requests that this Court grant the Motion for Summary Judgment.

Dated: 12-4-6

BY: ______________________

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Attorneys for Plaintiff

Exhibit A

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LAWRENCE E. FELDMAN d/b/a LAWRENCE E. FELDMAN & ASSOCIATES	:	No. 06-cv-2540
v.	:	
GOOGLE, INC.	:	

DECLARATION OF LAWRENCE FELDMAN

The undersigned hereby declares as follows:

1. I am the plaintiff in this matter.

2. I am restricted from strenuous activities, including extended travel, because of a heart condition.

3. I had a Myocardial infarction in March 2006, and am currently on disability.

4. I am not certain at this point when I will be able to return to work, as I have Coronary Artery Disease, and have received two cardiac stents so far.

5. If this matter is transferred to California, I would have difficulty participating in the case.

Lawrence E. Feldman, Esquire

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

LAWRENCE E. FELDMAN d/b/a LAWRENCE E. FELDMAN & ASSOCIATES	:	No. 06-cv-2540
v.	:	
GOOGLE, INC.	:	

ORDER

AND NOW, this _____ day of ___________, 2006 upon consideration of the Motion of Plaintiff Feldman for Summary Judgment, and any response thereto, it is hereby ORDERED and DECREED that said Motion is GRANTED.

BY ORDER OF THE COURT

____
HONORABLE JAMES T. GILES
Judge, United States District Court

CERTIFICATE OF SERVICE

The undersigned, counsel for Lawrence E. Feldman hereby certifies that a true and correct copy of the foregoing Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment was sent via first class mail postage pre-paid this day to the following individual(s):

Jeffrey M. Lindy
1800 J.F.K Boulevard, Suite 1500
Philadelphia, Pennsylvania 1903

Attorney for Defendant Google, Inc.

Date 12/4/2006

BY: ______________________
William E. Angle, Esquire